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Arizona Corporation Commission
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IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. RT-00000F-02-0271

AT&T'S REPLY BRIEF

PUBLIC VERSION – TRADE SECRET DATA REDACTED

AT&T Communications of the Mountain States, Inc., and TCG Phoenix (collectively "AT&T") hereby file their reply brief.

I. INTRODUCTION

AT&T believes the Commission has the legal authority to order monetary and non-monetary penalties. AT&T also believes the evidence introduced in this proceeding adequately support the fines proposed by the Residential Utility Consumer Office ("RUCO") and the Staff of the Arizona Corporation Commission. The evidence demonstrates that Qwest Corporation ("Qwest") entered into interconnection agreements with certain competitive local exchange carriers ("CLECs") that it intentionally and willfully failed to file pursuant to 47 U.S.C. 252 and the Arizona Administrative Code. Several CLECs also negotiated with Qwest discounts that were not available to other

CLECs, and assisted Qwest in structuring the agreements in an attempt to make them unavailable to other CLECs.

II. ARGUMENTS

A. Qwest's Belated Structural and Procedural Steps to File the Agreements Do Not Mitigate the Violations

Qwest suggests that the scope of section 252 was unclear prior to the Federal Communications Commission's ("FCC") October 4, 2002, Declaratory Order. AT&T disagrees. As AT&T noted in its initial brief, the other regional Bell operating companies had no problem determining the scope of section 252. Staff reviewed the issue and came up with a requirement consistent with the FCC. Qwest's own definition of an interconnection agreement in its Statement of Generally Available Terms and Conditions ("SGAT") leaves little doubt that Qwest knew what an interconnection agreement was. But the most telling are the statements made by Eschelon's and McLeod's negotiators.

CONFIDENTIAL [[redacted]] Staff Ex. 1, Exhibit S-32 (Fisher Deposition at 59). In a letter to Qwest, Eschelon's President stated that Eschelon "may also have a mechanism that makes it more difficult for any party to opt into our agreement." RUCO 1B, Exhibit CD-63. Eschelon's President also testified that Qwest was "attempting to construct a unique agreement with Eschelon, and the agreement had to be unique to Eschelon ..." *Id.*, Exhibit CD-62 (Smith Deposition at 43).

Q. Did she [Audrey McKenny] tell you why the arrangement with Eschelon had to be unique?

A. Sure. It would allow us to construct an agreement that was specific to Eschelon, unique to Eschelon, and so other carriers would not be able to get the same agreement.

Id.

In one instance, Eschelon's attorney suggested that certain language be removed from a draft document ("and the Interconnection Agreements are hereby amended accordingly") because the language "would defeat the confidentiality of the letter. For example, the MN PUC has specifically ordered that amendments must be filed with, and approved by the PUC. In any event, this would be the result under the Act." *Id.*, Exhibit CD-69. Finally, in an email from Qwest to Eschelon, a Qwest representative stated:

> First, Audrey proposes that the two issues be addressed in separate letters because the Implementation Plan paragraph addresses and amends the Escalation Procedures Confidential Letter and the other paragraph, about the audit, addresses and amends the Confidential Amendment to Confidential/Trade Secret Stipulation. Audrey's (and my) primary concern is that, of all the confidential agreements, the escalation letter is the most likely to be subject to disclosure down the road. For that reason, in amending a provision of that letter, we'd be wise not to introduce separate confidential matters into the amending letter.

Id., Exhibit CD-70.

It is obvious that Qwest was playing fast and loose with the filing requirements of the Act. It was trying to structure the agreements to avoid the pick-and-choose requirements of the Act. Qwest obviously has some understanding that the agreements were subject to the filing requirements and was structuring the agreements in a manner to avoid the pick-and-choose obligations in the event the agreements were ultimately filed. Although Qwest provided a number of justifications for not filing all the agreements *after*

the fact,[1] Qwest has not provided any internal Qwest documents that were drafted at the time the agreements were negotiated or entered into that explain to its employees the requirements to file or not file certain agreements.

Any structural or procedural requirements implemented years after the agreements were entered into cannot mitigate the initial intentional and willful violations. The FCC's order simply confirmed the requirements of the Act. The only clarification had to do with the backward-looking settlements, order and contract forms and agreements entered into in bankruptcy.[2] These types of agreements generally have not been an issue in this proceeding.

Contrary to suggestions by Qwest, the FCC did not state that all contract provisions that are generally available need not be filed. Qwest Brief at 9. The FCC's order was very specific that dispute resolution or escalation provisions that are generally available on the web site need not be filed.[3] If Qwest's reasoning was adopted, any interconnection agreement based on the SGAT, or portion of an agreement, would not have to be filed for approval because the SGAT is on Qwest's web site. This is illogical, because the Act specifically states that agreements reached by voluntary negotiation must be filed for approval. 47 U.S.C. § 252(e).[4]

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[1] AT&T Initial Brief at 8.
[2] *See* AT&T's Initial Brief at 9-10.
[3] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)1,* WC Docket No. 02-89 Memorandum Opinion and Order, FCC 02-0276 (rel Oct 4, 2002), ¶ 9 ("Declaratory Order"). A copy of the order is attached to Staff witness Kalleberg's testimony. *See* ST-1, Ex S-2.
[4] 47 U.S.C. § 252(f)(s) also states that the filing of an SGAT does not relieve an RBOC of its duty to negotiate under section 251.

B. The Commission Has an Adequate Record to Support the Staff's and RUCO's Penalties.

Qwest argues that the Commission cannot rely on the testimony of RUCO's and Staff's experts. Qwest Brief at 23. Qwest also argues that Mr. Clay Deanhardt's testimony is inadmissible, *id* at 24-26, Ms. Marta Kalleberg's testimony does not support the remedies and penalties proposed by Staff, *id* at 27-28, and Ms. Marylee Diaz Cortez was biased, *id* at 28-30. What Qwest fails to acknowledge is that "[n]either the commission nor a commissioner shall be bound by technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the commission or a commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission." A.R.S. § 40-243.A. *See* also the Ariz. Adm. Code R14-3-103.K. This statute overrules Qwest's objections.

Assuming for the sake of argument the legal standard is whether there is substantial evidence, there is more than substantial evidence to support penalties against Qwest. Qwest's Brief, quoting from a court decision, states that "substantial evidence," means "evidence of substance which establishes facts and from which reasonable inferences may be drawn. It does not connote suspicion, imaginative suggestions, surmises or conjuncture. Reasonable inferences are not fine-spun arguments but are inferences based upon a reason or that a reasonable man would accept."[5] If one reviews the evidence and documents in the record, which are extensive, a reasonable man could draw the same conclusions RUCO's and Staff's witnesses have, as can the Commission based on the documents in the record alone, without having to rely on any of the

[5] *See* Qwest's Brief at 23. Quote is from *City of Tucson v. Citizens Utils. Water Co.*, 17 Ariz. App. 447, 481 (Ariz. Ct. App. 1972)

testimony. The testimony may provide a road map, but the Commission is not prevented from reviewing the documents in the record and drawing its own conclusions. Qwest was free to file any additional documents it wanted the Commission to review in arriving at its conclusions. The evidence is so overwhelming that it is amazing to AT&T that Qwest continues to argue that McLeod and Eschelon did not receive discounts.

C. Qwest Discriminated Against Arizona CLECs.

The 1996 Act prohibits discrimination in the provision of section 251 services. The FCC has held the nondiscrimination provisions prohibit discrimination in favor of the RBOC and its affiliates and prohibit the RBOC from discriminating in favor of one CLEC versus another.[6]

Qwest argues that all the CLECs received the same level of service and all Arizona CLEC orders were processed under the same standard. This may be true. It does not, however, prohibit a finding of discrimination. Service levels and order processes do not address favorable escalation or dispute processes or favorable pricing terms.

Qwest argues that the escalation procedures in the Eschelon agreement are "*identical* to the standard escalation chart used by *all* wholesale customers." Qwest Brief at 32 (emphasis in original). This simply is not true. The Eschelon and McLeod agreements provided a 6-level escalation procedure. Joint Exhibit 1, Nos. 3 & 11. This sixth level is not reflected in the escalation procedure on Qwest's web site. TR 291-2 (March 18, 2003). Qwest argues that all CLECs had an unwritten opportunity to escalate beyond the vice-president level and the Eschelon and McLeod agreements "merely

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 312 ("*Local Competition Order*").

memorialized what occurs for all CLECs." Qwest Brief at 32. Qwest argues no CLEC provided an example of senior management refusing to handle an escalation. *Id.* The problem is, the evidence provides unrebutted proof that Eschelon's **CONFIDENTIAL** [redacted] agreements had an additional escalation provision in writing that is not reflected on the Qwest web site or in other CLEC agreements. Qwest had the burden at this point to refute the obvious discrimination. Its only response is that the rest of the CLECs got the same treatment,[7] although this treatment was not reflected in their agreements or on the web site.

Qwest states that no other CLEC purchased UNE-Star, and therefore, by implication, no other CLECs could be discriminated against. It may be because, as RUCO's witness pointed out, the public agreement did not appear economic. Regardless, whether other CLECs purchased UNE-Star is irrelevant.

Qwest does admit that under UNE-Star, Eschelon received a credit for each month that Qwest did not provide accurate daily usage information for Eschelon's use in billing switched access. Qwest Brief at 36. Qwest argues that "this credit is offered only when Qwest fails to provide accurate daily usage information until a mechanized process for UNE-Star is in place." *Id.* Since no other CLECs besides Eschelon **CONFIDENTIAL** [redacted] purchased UNE-Star, according to Qwest, no other CLEC would have been eligible. *Id.* The problem with Qwest's analysis is that Qwest was obligated by law to provide UNE-P and provide accurate daily usage information to UNE-P customers so these customers could bill IXCs for switched access as well. The requirements are the same, whether you call the "product" UNE-P or UNE-Star.

[7] Except for Qwest's self-serving statements, there is no evidence that all CLECs could avail themselves of the same process. This information is in the possession of Qwest, not the CLECs, Staff or RUCO.

The Act does not identify "products." It requires access to unbundled network elements ("UNEs"). In this case, UNE-Star and UNE-P are made up of the same UNEs. Purchasers of UNEs are entitled to bill IXCs for switched access and Qwest is required to provide the CLECs the daily usage information to enable then to do so.[8] Accordingly, any purchaser of UNEs providing exchange access or local service should be entitled to the credit if DUF records were inaccurate, regardless of the name Qwest places on the ultimate combination. Qwest cannot discriminate against some CLECs simply by calling a UNE combination by a different name.

Even if Qwest could argue the two products are somehow different, had Qwest filed the agreement, CLECs purchasing UNE-P would have been given the opportunity to demonstrate why they should also be entitled to a credit because of Qwest's failure to provide accurate DUF.[9]

Since the FCC speaks in terms of UNEs, not RBOC products, under the FCC rules any purchaser of UNEs providing exchange access or local exchange service would have been entitled to the credit. It is clear that Qwest simply tried to create a unique service for two customers so that it could discriminate against other CLECs. This is prohibited by the Act.

D. Discount Agreements

Qwest argues the agreement with Eschelon to purchase consulting services was not a sham. Similarly, Qwest argues the **CONFIDENTIAL [** [redacted]

[8] *Local Competitive Order*, ¶ 363, n. 772; *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLata Services in Louisiana,* CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998), ¶¶ 160 and 208.

[9] If Qwest filed the agreement, it would have been an admission by Qwest that it was not in compliance with the FCC's orders and section 271. This raises the issue of Qwest's intent and the relationship between the failure to file the agreements and the section 271 docket.

[redacted] were legitimate agreements. The simple response is that Qwest is arguing form over substance.

As noted earlier, Qwest wanted unique arrangements with **CONFIDENTIAL** [redacted] Eschelon so other carriers could not opt in. In Eschelon's case, there is no evidence of discussions regarding a consulting agreement before the actual agreement was signed. According to a letter from Eschelon's President to Qwest dated November 5, 2000, the volume discount had been agreed to on October 21, 2000. The letter is dated 10 days before the final agreements were signed. The President of Eschelon wrote "we may also have a mechanism that makes it more difficult for any party to opt into our agreement." RUCO 1B, Exhibit CD-63. Furthermore, the Eschelon President did not care if other carriers would be able to obtain the same terms as Eschelon. *Id.*, Exhibit CD-62 (Smith Deposition at 43-44). Ten days before the agreements were signed, both companies were still attempting to construct a discount arrangement for Eschelon that other carriers could not take advantage of. The result was the bogus consulting agreement.

As pointed out by Mr. Deanhardt in his testimony, companies had every incentive to and did work with Qwest for free to enable them to sell their services. RUCO 1B, at 59-60. There is no evidence other CLECs got paid for the help they provided to Qwest. Qwest's own witness admitted the CLECs participating in the Change Management Process provided valuable services to Qwest and did not get paid.

Mr. Deanhardt testified there was little evidence to support the consulting arrangement. *Id.*, at 58-59. But the two facts that are the most damaging are that 1) the agreement ties Eschelon's compensation to amount of purchases from Qwest, 2) if

Eschelon did not meet its purchase commitment, then Eschelon got no compensation (discount) for consulting services, regardless of how much consulting it did for Qwest. *Id.*, at 58. Eschelon's President words were, "we may also have a mechanism that makes it more difficult for any party to opt into our agreements." The consulting agreement was the mechanism.

A reasonable man looking at the evidence can conclude that the consulting agreement was a sham and served only to memorialize a 10% discount. The fact that Qwest and Eschelon were working together to arrive at an arrangement other CLECs could not opt into also supports a finding the consulting agreement was a sham.

CONFIDENTIAL [redacted] Mr. Deanhardt does a very good job laying out the evidence. His analysis does not need repeating. Once again, reasonable men could conclude a discount existed. The most damaging evidence is that **CONFIDENTIAL** [redacted]

Qwest makes an issue regarding the accounting treatment of the agreements by McLeod and Qwest. Qwest Brief at 46-47. The accounting treatment is not determinative. First, Qwest, Eschelon **CONFIDENTIAL** [redacted] were structuring the discount agreements so other carriers could not opt in. A consulting

agreement and take-or-pay agreement are not inconsistent with their intent. Second, Eschelon **CONFIDENTIAL** [redacted] did receive a 10% discount on all services purchased from Qwest. **CONFIDENTIAL** [redacted] The fact that the accountants booked the revenues in a manner consistent with the terms of the written agreement (which they were not involved in negotiating) is not determinative or relevant where the parties to the agreement were attempting to deceive regulators and the public as to the true nature of the agreement.

E. Penalties

Qwest argues the penalties imposed "should be measured by and proportionate to the proven harm resulting from unfiled agreements, rather than a speculative guess about their effects." Qwest Brief at 49. Qwest's approach sounds good but would allow Qwest to get off way too lightly.

Qwest wants the Commission to focus on actual harm. Qwest wants the Staff and RUCO to demonstrate actual harm to specific CLECs and the market. Qwest wants the Commission to analyze the agreements to determine if CLECs could have opted into the agreements. If they could not have opted in there could be no harm.

The problem with Qwest's analysis is there was a conscious and intentional effort on Qwest, Eschelon **CONFIDENTIAL** [redacted] part to structure the agreements in a manner so that other CLECs could not opt into them. It hardly makes sense to

determine whether a CLEC could have opted into the agreements when they were designed to prevent other CLECs from opting in.

Qwest suggests that the Commission overlook its conduct and intent and focus on actual harm to CLECs. This would make the laws and rules irrelevant. In other words, Qwest suggests that it can enter into 96 secret agreements, structure them in a way that other CLECs cannot opt into, provide illegal discounts to specific carriers (that other CLECs without discounts have to compete against), not file the agreements as required by law and then after it gets caught suggest the CLECs and Commission have to prove actual harm. Nonsense. The statutes do not require such a showing.[10] The Commission only need show that Qwest violated the law.

Eschelon complains that it would be harmed by the proposed penalties. Its President showed no concern about other CLECs when it entered into the secret discounts. He did not care that other CLECs might be precluded from opting in. He was willing to assist Qwest in structuring an agreement so other CLECs could not opt in. Eschelon **CONFIDENTIAL** [ ] were willing participants with Qwest. Eschelon did not provide any witnesses to explain the agreements or negotiations. McLeod did not even intervene in the proceeding. Now, Eschelon is concerned that the proposed penalties may harm Eschelon and discriminate against it. Eschelon Brief at 5 and 10. How ironic.

AT&T is not going to debate the Commission's authority to impose non-monetary penalties that may directly and indirectly affect Eschelon and McLeod. However, should the Commission believe due process prohibits imposition of any penalties that affect

[10] Having manipulated the entire process up to now, Qwest now wants to manipulate how damages are assessed. But it is telling that two of the largest CLECs that did receive a discount are still in business. That says a lot by itself.

Eschelon and McLeod, the Commission should take Eschelon's suggestion and open a separate proceeding against Eschelon and McLeod, incorporate the entire record of this proceeding, provide Eschelon and McLeod their day in court, and order appropriate penalties.[11]

III. CONCLUSION

Qwest's conduct was egregious. No question about it. The message the Commission needs to send Qwest is that it better not happen again.

Qwest suggests that because it has implemented structural and procedural safeguards after the fact it should not be treated harshly. The problem with this approach is that it does not send the proper message to Qwest that it must conduct its affairs properly and lawfully. If it can continue to be a bad actor and respond after the fact with new processes and procedures and avoid significant fines, it has no incentive to act properly in the first place.

Considering the nature of Qwest's conduct, RUCO's and Staff's proposed penalties are reasonable.

[11] *See* Eschelon's Brief at 5 ("If, based on the record, the Commission determines that it wants to pursue penalties against Eschelon, a separate proceeding should be opened.")

Respectfully submitted this 15th day of May, 2003.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG PHOENIX

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